MEGNAWAY ENTERPRISE SDN BHD

v.

SOON LIAN HOCK

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[SUIT NO: MT1-22-155-2001]
10 SEPTEMBER 2002

CIVIL PROCEDURE: *Preliminary objection - Procedural and technical objection - Whether objections strictly in relation to non-compliance - Whether disregarding them would occasion miscarriage of justice - Rules of the High Court 1980, O. 1A, O. 2 r. 3*

CIVIL PROCEDURE: *Summary judgment - Injunction - Application for injunctive relief under O. 14 of the Rules of the High Court 1980 - Whether proper procedure - Rules of the High Court 1980, O. 14 r. 1(1)*

CIVIL PROCEDURE: *Summary judgment - Triable issues - Whether plain and obvious case - Whether "there ought for some reason to be a trial of that claim" - Rules of the High Court 1980, O. 14 r. 3(1) - Specific Relief Act 1950, s. 51(2)*

This was the plaintiff's application for summary judgment against the defendant under O. 14 of the Rules of the High Court 1980 ('RHC') praying for an injunction restraining the defendant from infringing the plaintiff's copyright, delivery up of all infringing reproductions and disclosure of all persons who supplied or offered to supply the defendant with infringing reproductions of metal components which make up an anti-theft system ('the reliefs sought'). The defendant raised several preliminary issues such as non-compliance with form 18 in appendix A of the RHC, and failure to endorse the date of filing of the affidavit; the plaintiff contended that these were technical rather substantive objections. The defendant also contended that O. 14 of the RHC should not be invoked as it was not the correct mode of application for the purpose of pursuing the reliefs sought. The defendant further alleged that there was an issue or question in dispute which ought to be tried or there ought for some reason to be trial, as the defendant categorically denied having sold the infringing metal component of the anti-theft system.

Held:

[1] Order 1A of the RHC states that in administering any of the rules herein, the court or a judge shall have regard to the justice of the particular case

and not only to technical non-compliance with any of the rules herein, while O. 2 r. 3 of the RHC expressly says that a court or judge shall not allow any preliminary objection by any party to any proceeding only on the ground of non-compliance with any of these rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice. In this case, since the procedural technical objections raised by the defendant were strictly in relation to non-compliance, disregarding them would occasion no miscarriage of justice. (p 107 d-f)

[2] Order 14 r. 1(1) of the RHC was sufficiently wide to cover the plaintiff's claim based on the reliefs sought, subject to the requirement (which had been complied with in the instant case) that such an application should be heard by a judge in chambers and not before a registrar. Hence, as a matter of procedure, the plaintiff could properly invoke O. 14 of the RHC as a mode of application for the purpose of pursuing the reliefs sought. (p 110 b-c)

[3] On the basis of the allegations of fact available in the respective affidavits of the parties herein, this was not a plain and obvious case, as it seemed clear that there were triable issues which would render summary judgment under O. 14 of the RHC eminently unsuitable. Furthermore, s. 51(2) of the Specific Relief Act 1950 would constitute the ground that "there ought for some reason to be a trial of that claim" (*ie*, the plaintiff's claim) expressly contained in O. 14 r. 3(1) of the RHC. (p 116a & g)

[Application dismissed.]

Case(s) referred to:

Bank fur Gemeinwirtschaft v. City of London Garages Ltd & Ors [1971] 1 All ER 541 ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 ***(refd)***

Beauford Baru Sdn Bhd v. Gopalan Krishnan VK Gopalan [2002] 3 CLJ 686 ***(refd)***

Catterpillar Inc v. Sun Forward Pty Ltd [1996] 36 IPR 411 ***(refd)***

Concentrate Engineering Pte Ltd v. United Malayan Banking Corp Bhd [1990] 3 MLJ 1 ***(refd)***

Day v. Snee [1814] English Reports Volume XXXV Chancery XV 443 ***(refd)***

Fabrique Ebel Societe Anonyme v. Syarikat Perniagaan Tukang Jam City Port & Ors [1988] 1 MLJ 188 ***(refd)***

Flocast Australia Pty Ltd v. Purcell & Ors [1998] 39 IPR 177 ***(refd)***

Gissco Sdn Bhd v. Blackgold (M) Sdn Bhd [1988] 2 MLJ 39 ***(refd)***

HSH Engineering & Construction Sdn Bhd v. Belton Properties Sdn Bhd & Anor [2001] 2 CLJ 186 ***(refd)***

Kepong Industrial Park Sdn Bhd & Ors v. Teoh Seng Aun & Ors (No 3) [2000] 4 MLJ 614 ***(refd)***

Kiwi Brands (M) Sdn Bhd v. Multiview Enterprises Sdn Bhd [1998] 2 CLJ Supp 194 ***(refd)***
LA Gear Inc v. Hi-Tec Sports Plc [1992] 19 FSR 121 ***(refd)***
Ladang Tai Tak (KT) Sdn Bhd v. Suppiah Andy Thavar & Ors [1999] 6 CLJ 348 ***(refd)***
Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 ***(foll)***
Miles v. Bull [1968] 3 All ER 632 ***(refd)***
Morrell v. Pearson [1849] English Reports, vol L, 1070 No 284 ***(refd)***
National Company For Foreign Trade v. Kayu Raya Sdn Bhd [1984] 2 MLJ 300 ***(refd)***
Overseas-Chinese Banking Corporation Limited v. Banhenly Holdings Sdn Bhd & Ors [1993] 2 CLJ 347 ***(refd)***
Schweppes Ltd & Ors v. Wellingtons Ltd [1984] 10 FSR 210 ***(refd)***
Shaik Alauddin v. Kamarutheen K Dawood [1988] 3 MLJ 336 ***(refd)***
Shell-Mex & BP Ltd v. Manchester Garages Ltd [1971] 1 All ER 841 ***(refd)***
Stesin Pty Ltd & Anor v. Johnson & Ors [1995] 29 IPR 461 ***(refd)***
United Malayan Banking Corp Bhd v Lim Meng Hua & Ors [1990] 1 MLJ 54 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 10(3)
Rules of the High Court 1980, O. 1A, O. 2 r. 3, O. 14 rr. 1(1), (2)(a), (b), (3), 3(1), 4, O. 34, O. 81, form 18
Specific Relief Act 1950, s. 51(1), (2)

Federal Court Rules [Aust], O. 10, O. 21 r. 1(1)(a), (b)
Rules of the Supreme Court [UK], O. 14
Rules of the Supreme Court 1971 [Western Aust], O. 16

Other source(s) referred to:
Malaysian High Court Practice 1998, MLJ Desk edn 1, p 268 para 14.1.1(5), p 287 para 14.3.4
Nelson's Laws of Injunctions, 1984, 2nd edn, pp 68 & 69
The Supreme Court Practice (The English Whitebook), vol 1, part 1, p 145
William Williamson Kerr, *A Treatise On The Law And Practice Of Injunctions*, 1999, 6th edn, p 35

For the defendant - Peter Gan; M/s Hock & Assocs
For the plaintiff - MK Lam (Sheila Jeya Balan); M/s Ram Rias & Partners

Reported by Suresh Nathan

a

JUDGMENT

Low Hop Bing J:

Application

The suit before me relates to an intellectual property matter. The application b for determination is the plaintiff's application in encl. (6) which prays for summary judgment against the defendant under O. 14 of the Rules of the High Court 1980 for injunction, delivery up of infringing reproductions, disclosures, damages, interest and costs.

c In the course of submissions, some of the aforesaid prayers were not pursued, as a result of which the reliefs sought were reduced to the following items:

1. An injunction to restrain the defendant from infringing the plaintiff's copyright in the said plaintiff's works by reproducing the same in three-dimensional form or otherwise from the said works and selling the same d or offering for sale or exposing the same for sale, importing, exporting, distributing or advertising or in whatever way dealing with the reproduction of the plaintiff's said works without the plaintiff's licence;

2. An order for delivery up of the following to the plaintiff within seven days from the date of the judgment: e

   (i) all infringing reproductions of the plaintiff's said works and articles; and

   (ii) all documents and materials relating to the or disposal of the infringing reproductions of the plaintiff's works, f

   and thereafter to file an affidavit verifying the same.

3. An order that the defendant discloses the following within seven days from the date of the judgment:

   g (i) the name and address of everyone who has supplied or offered to supply the defendant;

   (ii) the name and address of whom the defendant has supplied, or offered to do so, with the infringing reproductions of the plaintiff's works; and

   h (iii) full details of the dates and quantities of every such supply and offer.

(The aforesaid items *viz* injunction, delivery up and discovery are collectively referred to as "the reliefs sought").

i

Counsel's Submission And Court's Decision

Preliminary Objection

Several preliminary issues were raised by Encik Peter Gan, learned counsel for the defendant, and such issues relate eg to non-compliance with Form 18 in Appendix A to the Rules of the High Court 1980 and the failure to endorse the date of filing on the affidavit.

Cik MK Lam and Cik Sheila Jeya Balan argued, *inter alia*, that the issues were technical rather than substantive objections.

Without having to expend too much time and effort on these issues which are fraught with technicalities, I am of the view that the short answer is to be found in PU(A) 197/2002 which came into force on 16 May 2002, wherein comprehensive amendments were made to the Rules of the High Court 1980. O. 1A states that in administering any of the rules herein, the court or a judge shall have regard to the justice of the particular case and not only to technical non-compliance with any of the rules herein, while O. 2 r. 3 expressly says that a court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance with any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

In my view, the technicalities raised for the defendant are strictly in relation to non-compliance and disregarding them would occasion no miscarriage of justice. *Beauford Baru Sdn Bhd v. Gopalan Krishnan a/l VK Gopalan* [2002] 3 CLJ 686 demonstrates the new trendsetter in rejecting preliminary objections founded on technical grounds. In that case, I made the following observations:

> As we move towards the era of facilitating the process of litigation, the raising of preliminary objections on technical grounds would certainly and clearly be a thing of the past. Quite recently, the Court of Appeal in *United Malayan Banking Corp Bhd v. Ernest Cheong Yong Yin* [2001] 2 CLJ 31, through the authoritative judgment of Ahmad Fairuz JCA (now Ag President of the Court of Appeal and CJ (Malaya)) expressly stated that a preliminary objection on a mere technicality should not be allowed to obstruct the process of giving justice to the deserving. The Court of Appeal had no hesitation in overruling the procedural technical objection. This principle is further manifested in the parallel and equipollent provisions in r. 3A of the Rules of the Court of Appeal (Amendment) 2002 (PU(A) 196/2002) and O. 2 r. 3 of the Rules of the High Court (Amendment) 2002 (PU(A) 197/2002), both of which came into force on 16 May 2002 in the following terms:
>
> Preliminary objection on the ground of non-compliance shall not be allowed.
>
> 3A A court or judge shall not allow any preliminary objection by any party only on the ground of non-compliance of any of these Rules unless the

court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

Preliminary objection for non-compliance of rules not allowed (O. 2 r. 3)

3 A court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance of any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

It is clearly the intention and wisdom of the Rules Committee to provide for the smooth administration of the due process of litigation and the administration of justice by way of substantial merits of the case and not on merely procedural technical objections. In my considered opinion, the advent of these amendments would mark the beginning of the end of learned counsel's urge to raise objections merely on strictly technical grounds, and it is my fervent hope that learned counsel's preliminary procedural technical objections would henceforth be consigned to oblivion for good.

Further, in *Megat Najmuddin bin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd* [2002] 1 CLJ 645 FC, Mohtar Abdullah FCJ observed:

The duty of the Federal Court, as the apex court, to ensure that justice is done far outweighs any procedural technicality preventing it from being done. ..., the Federal Court must decide the case in the interest of justice, to redress the wrong and uphold the right, uninhibited by the technicalities strewn in its path.

On the aforesaid grounds, I overrule the procedural technical objections raised for the defendant.

Applicability Of O. 14 To Injunctive Relief

It was contended for the plaintiff that summary judgment under O. 14 of the Rules of the High Court 1980 may be given in favour of the plaintiff in terms of the reliefs sought.

The defendant's response is that O. 14 should not be invoked as it is not the correct mode.

In my view, the aforesaid respective submissions give rise to two issues which may be formulated as follows:

(1) whether, as a matter of procedure, a plaintiff may properly invoke O. 14 as a mode of application for the purpose of pursuing the reliefs sought ("the first question")?

(2) whether, after considering the merits of the plaintiff's application in the light of the facts and circumstances in the instant case, the plaintiff is entitled to the reliefs sought ("the second question)?

For the purpose of arriving at an answer to the first question, it is pertinent to reproduce the relevant provisions of O. 14, *viz* O. 14 r. 1(1), (2) and (3); and O. 14 r. 3(1) as follows:

> O. 14 r. 1(1) Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has entered an appearance in the action, the plaintiff may, on the ground that defendant has no defence to a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against that defendant.
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> (2) Subject to paragraph (3), this rule applies to every action begun by writ other than one which includes:
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> (a) a claim by the plaintiff for libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage; or
>
> (b) a claim by the plaintiff based on an allegation of fraud.
>
> (3) This Order shall not apply to an action to which Order 81 applies.
>
> O. 14 r. 3(1) Unless on the hearing of an application under rule 1 either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.

The purpose of O. 14 is well-known. It provides for a procedure which is swift and fast, whereby the plaintiff may obtain judgment expeditiously, but only in plain and obvious cases where on the facts or the law, the defence is clearly unsustainable.

O. 14 applies to a wide spectrum of actions, but with the following exceptions:

(a) under O. 14 r. 1(2) para (a), where the plaintiff's claim includes libel, slander, malicious prosecution, false imprisonment, seduction or breach of promise of marriage;

(b) under O. 14 r. 1(2) para (b), where the plaintiff's claim includes a claim based on an allegation of fraud; or

(c) under O. 14 r. 1(3), where an action to which O. 81 applies eg a claim for specific performance, rescission or forfeiture or return of any deposit made under an agreement.

O. 14 r. 1(1) is in my view sufficiently wide to cover the plaintiff's claim based on the reliefs sought, subject to the requirement (which has been complied with in the instant case) that such an application shall be heard by a Judge in chambers and not before a registrar: s. 10(3) of the Courts of Judicature Act 1964; *Shell-Mex And BP Ltd v. Manchester Garages Ltd* [1971] 1 All ER 841, referred to in *Fabrique Ebel Societe Anonyme v. Syarikat Perniagaan Tukang Jam City Port & Ors* [1988] 1 MLJ 188; followed in *Shaik Alauddin v. Kamarutheen K Dawood* [1988] 3 MLJ 336; *Malaysian High Court Practice* 1998 MLJ Desk Edn 1 at p. 268 para 14.1.1(5); "*The Supreme Court Practice*" (The English Whitebook) vol. 1 Part 1 p. 145. The answer to the first question is therefore in the affirmative.

Having disposed of the first question, I shall now proceed to consider the second question.

At this juncture, it is pertinent to observe that the submission for the plaintiff relied upon four decisions handed down in other jurisdictions where summary judgment has been given in favour of the plaintiff on ground of copyright infringement of drawings.

By way of illustration, in *Flocast Australia Pty Ltd v. Purcell and Ors* [1998] 39 IPR 177, the facts revealed that the applicant (Flocast) manufactured cast iron pipes. During the mid-1980s, Flocast developed new machinery for casting iron, retained drawings of this new machinery on its premises, and caused its employees to create two manuals, which described aspects of Flocast's business.

During the early 1990s, Flocast employed the first respondent (Mr Purcell) as the company's secretary and financial controller. In 1994, Mr Purcell left Flocast's employment and took up a position with another company, Postureslat. Shortly after Mr Purcell's departure, the second and third respondents also left Flocast, to work with Mr Purcell. Mr Purcell then established a company the fourth respondent (Tiger Bronze).

Tiger Bronze began contacting Flocast's customers, offering to supply cast iron products at prices generally below those of Flocast. Flocast then discovered that all its business records (including its customer list) had been copied onto Postureslat's computers. Following the granting of an Anton Piller order, Flocast also discovered that Mr Purcell had copied Flocast's manuals and some of its drawings.

In 1994, Flocast commenced proceedings against the respondents, seeking injunctive relief and damages. About three years later, Flocast applied for leave to discontinue proceedings, and for summary judgment against Mr Purcell and Tiger Bronze, under O. 21 r. 1(1)(a) and (b) of the Federal Court Rules (of Australia), reproduced as follows:

> 1(1) Where, in relation to the whole or any part of the applicant's claim for relief, there is evidence of the facts on which the claim or part is based, and:
>
> (a) there is evidence given by the applicant or by some responsible person that, in the belief of the person giving the evidence, the respondent has no defence to the claim or part; or
>
> (a) the respondent's defence discloses no answer to the applicant's claim or part
>
> the applicant may move on notice for such judgment for the applicant on that claim or part and the Court may pronounce such judgment and make such orders as the nature of the case requires.

Heerey J adopted the judgment of Drummond J in *Catterpillar Inc v. Sun Forward Pty Ltd* [1996] 36 IPR 411 at 413 and clarified that O. 20 r. 1(1)(a) and (b) above differed materially from the original English O. 14 which has become the model of O. 14 in Malaysia. Although Heerey, J stated that O. 10 of the Federal Court Rules (Australia) provides for a system of case management, the learned judge's judgment did not set out *in extenso* the provisions thereof. Hence, I am unable to ascertain if their O. 10 is in *pari materia* with our O. 34 of the Rules of the High Court 1980 relating to case management. The learned judge held that the Australian O. 20 r. 1(1) does not justify the detailed restrictions applicable to the traditional summary judgment rules under O. 14. The Australian O. 20 r. 1(1) is limited to providing an expeditious means of resolving litigation where the applicant can clearly demonstrate that there is no real defence to particular claims made by it. It is to be noted that the provisions of the Australian O. 20 are not in *pari materia* with our O. 14.

On the facts, Heerey J was satisfied that the applicant has made out a case for summary judgment for injunctive relief. However, in the light of the learned judge's view that there is a material difference between the Australian O. 20 and the traditional O. 14 such as that contained in our Rules of the High Court 1980, I am unable to see how support may be derived from the Australian decision.

The next case on which the plaintiff placed reliance is *Stesin Pty Ltd And Another v. Johnson And Others* [1995] 29 IPR 461 which related to the third

defendants' application for summary judgment against the plaintiff under O. 16 of the Rules of the Supreme Court 1971 (Western Australia). The judgment of Master Bredmeyer did not set out the provisions of the said O.16, under which summary judgment was entered for the third defendants. In the circumstances, I am in no position to treat that case as an authority for entering summary judgment under our O. 14.

Schweppes Ltd And Others v. Wellingtons Ltd [1984] 10 FSR 210, relied upon by the plaintiff, concerned a copyright infringement action. The subject matter was the plaintiffs' label for Indian tonic water. The defendants' label in issue was substantially similar to the plaintiffs', the principal difference being that whereas the plaintiffs' labels bore the trade mark Schweppes, the corresponding labels of the defendants bore in the same places, the word Schweppes. This, so the defendants said, was intended as a joke, their labels being parodies of the plaintiffs' labels. The plaintiffs, who did not share the defendants' point of view, commenced proceedings for *inter alia* copyright infringement and sought summary judgment against the defendants under O. 14. Subsistence and ownership of copyright was not in issue.

Falconer J held that the defendants' labels reproduced a very substantial part of the plaintiffs' copyright work. There was no defence to the claim based upon the alteration to the work by way of parody. Judgment under O. 14 was entered for the plaintiff.

The fourth and final case cited for the plaintiff is *LA Gear Inc v. Hi-Tec Sports Plc* [1992] 19 FSR 121, where the facts as summarised in the headnote are as follows:

> An employee of the plaintiff made a drawing for a man's shoe (the Fire shoe). She later made drawings for an adaptation of the fire shoe for women (the Flame shoe). Shoes were manufactured to the drawings and subsequently marketed.
>
> The plaintiff obtained a shoe originating with the defendant which appeared substantially identical to the Flame shoe (the Flair shoe). A letter before action was written on 29 August 1989, enclosing a copy of a drawing for the Flame shoe and claiming copyright in the drawings from which the shoes were made.
>
> In early September 1989 the defendant imported 40 pairs of Flair shoes. Samples of the Flair shoe were in the possession of the defendant's employees at a trade fair on 17 September 1989, but were not openly exhibited or offered for sale.
>
> By a letter of 18 September 1989, the plaintiff's solicitors informed the defendant that the Flame shoe had been designed in conjunction with the Fire shoe, enclosed a second drawing for the Flame shoe and promised to send the design drawings for the Fire shoe. In a further letter dated 28 September

1989 the plaintiff's solicitors complained about the events at the trade fair and requested undertakings. In its solicitors' reply of 3 October 1989, the defendant stated that proper particulars of the drawings relied on had not been supplied and until that was done there was no reason for the defendant to change its plans. On the same date, the plaintiff's solicitors sent a copy of the drawing for the Fire shoe and threatened commencement of proceedings on 9 October 1989 if undertakings were not given. The writ was issued on 9 October 1989, claiming infringement of copyright and passing off.

The plaintiff issued a summons for summary judgment and injunctions to restrain infringement of copyright. The defendant claimed that there were four triable issues: (i) whether the drawings were original, (ii) whether copying had occurred, (iii) whether the alleged acts of secondary infringement had been committed and (iv) whether the defendant knew or had reason to believe that the Flair shoes were infringing copies of the drawings relied upon at the time of the alleged acts of secondary infringement.

Morritt J held, so also did the Court of Appeal, that there were no triable issues and entered O. 14 summary judgment for the plaintiff.

The aforesaid two English cases demonstrate that in the event the court comes to a specific finding that there is infringement of copyright and that there is no triable issue raised by the defendant, the court is under O. 14 in a position to give summary judgment in favour of the plaintiff. Conversely, where there are triable issues, no summary judgment would be given: *Kiwi Brands (M) Sdn Bhd v. Multiview Enterprises Sdn Bhd* [1998] 2 CLJ Supp 194.

Under O. 14 r. 1(1), as a general rule, a plaintiff, who has served the statement of claim on the defendant who has in turn entered an appearance, may apply by summons supported by an affidavit verifying the facts and stating that the defendant has no defence to the plaintiff's claim. The plaintiff would have established a *prima facie* case and become entitled to summary judgment. The onus then shifts to the defendant to satisfy the court why judgment should not be entered against it pursuant to r. 3 and r. 4: *National Company For Foreign Trade v. Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 at 301-302 per George Seah FCJ, *Malaysian High Court Practice*, *supra*, at p. 287, para 14.3.4.

The duty of a judge hearing an O. 14 application is, apart from identifying the issues of fact or law, to go one step further and to determine whether they are triable: per Mohamed Azmi SCJ in *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14.

At this juncture, it is necessary to consider the facts and circumstances as affirmed by the plaintiff in support of the plaintiff's application.

Briefly, the plaintiff is a private limited company carrying on the business of manufacturing and distributing anti-theft system made specifically for automobiles of Proton Iswara, Proton Wira, Proton Perdana, Proton Satria, Perodua Kancil, Perodua Kembara and Perodua Kenari make ("the said automobiles") sold under the trade mark "THEF-PRO" since 1991.

The plaintiff is the owner of the copyright subsisting in the drawings of the metal components which make up the said anti-theft system being artistic works and any three-dimensional reproductions of the drawings thereof.

The defendant is a sole proprietor and is in the business of selling *inter alia* car accessories.

The defendant was alleged to have infringed and is allegedly continuing to infringe the plaintiff's copyright by distributing, selling, offering or exposing for sale metal components of an anti-theft system sold under the trade mark "Safety-First Anti-Car Theft System" which are allegedly reproductions of the whole works or substantial reproductions of the plaintiff's said artistic works in the said drawings of the metal components in Malaysia without the plaintiff's licence or consent.

The plaintiff's case is apparently founded on the consent judgment which was recorded against three other parties, for infringement of the plaintiff's copyright by manufacturing and selling reproductions of the said drawings. The defendant was not a party to the consent judgment. However, it was the plaintiff's case that the defendant was allegedly selling and distributing to the public allegedly infringing goods under the mark "Safety-First Anti-Car Theft System", and that the defendant has also infringed the plaintiff's copyright in the said drawings.

It was argued for the defendant that this consent judgment is not relevant to the instant case.

Further, it was the defendant's contention that the plaintiff's ownership of copyright has to be established by way of cross-examination and not by way of affidavit evidence.

Relying on O. 14 r. 3(1), it was canvassed for the defendant that there is an issue or question in dispute which ought to be tried or there ought for some other reason to be a trial, as the defendant has *vide* affidavit categorically denied having sold the infringing metal component of an anti-theft system to the trap purchaser one Au Wing Wai, the plaintiff's manager.

In my considered opinion, the reliefs sought, as alluded to above, consist of perpetual prohibitory injunctions, as well as mandatory injunctions, which the plaintiff seeks to obtain by way of summary judgment under O. 14.

The question before me is: whether, upon a proper perusal of the allegations of fact contained in the respective affidavits, there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim, as clearly provided in O. 14 r. 3(1).

The words "there ought for some other reason to be a trial" are, as observed by Megarry, J (as he then was) in *Miles v. Bull* [1968] 3 All ER 632; 637 very wide and have special significance where "most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her. If the defendant cannot point to a specific issue which ought to be tried, but nevertheless satisfies the court that there are circumstances that ought to be investigated, then I think those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff." (See also *Kiwi Brands (M) Bhd. v. Multiview Enterprises Sdn Bhd supra; Overseas-Chinese Banking Corporation Limited v. Banhenly Holdings Sdn Bhd & Ors* [1993] 2 CLJ 347, 350; *Gissco Sdn Bhd v. Blackgold (M) Sdn Bhd* [1988] 2 MLJ 397; *Concentrate Engineering Pte Ltd v. United Malayan Banking Corp Bhd* [1990] 3 MLJ 1, 4; *Bank fur Gemeinwirtschaft v City of London Garages Ltd & Ors* [1971] 1 All ER 541, 548; and *United Malayan Banking Corp Bhd v. Lim Meng Hua & Ors* [1990] 1 MLJ 54, 57).

In the instant case, the question of a trap purchase carried out by the plaintiff's manager is an issue of much controversy. Plaintiff's allegation is that the defendant has sold the infringing metal component of an anti-theft system, which has been strongly denied by the defendant. The defendant's response was that what has been sold to the plaintiff's manager was a "power window" or "bracket" as stated in the defendant's cash sale receipt. It is also not plain and obvious that the metal component of an anti-theft system as described by the plaintiff is identical to the defendant's "power window" or "bracket".

In the light of these conflicting affidavits containing diametrically opposite views, *viva voce* evidence would become necessary, whereby the veracity of the witnesses and their demeanour, candour and conduct can be closely scrutinised by the court in a full trial. This is a rule of prudence and sound principle: *Kepong Industrial Park Sdn Bhd & Ors v. Teoh Seng Aun & Ors (No 3)* [2000] 4 MLJ 614.

On the basis of the allegations of fact available in the respective affidavits of the parties herein, I am of the view that this is not a plain and obvious case, as it seems clear to me that there are triable issues which would render summary judgment under O. 14 eminently unsuitable.

In addition, the perpetual prohibitory injunction, and the perpetual mandatory injunction are certainly draconian in nature and would only be granted in exceptional circumstances.

Unlike a temporary injunction which continues until a specified time, or until further order of the court, and may be granted at any period of a suit under s. 51(1) of the Specific Relief Act 1950, a perpetual injunction which perpetually enjoins a defendant from the assertion of a right or from the commission of an act, which would be contrary to the rights of the plaintiff, can only be granted by the decree made at the hearing and upon the merits of the suit: s. 51(2) of the same Act (see also *Nelson's Laws of Injunctions*, 2nd edn, 1984, pp. 68 and 69; *A Treatise On The Law And Practice Of Injunctions*, Sixth edn, 1999 by William Williamson Kerr, at p. 35; *Day v. Snee* Dec. 5, 1814, *English Reports Volume XXXV Chancery XV* at p. 443; *Morrell v. Pearson*, Dec 10, 1849, *English Reports*, vol L, p. 1070 No. 284; *Ladang Tai Tak (KT) Sdn Bhd v. Suppiah Andy Thavar & Ors* [1999] 6 CLJ 348, per Abdul Malik Ishak J; *HSH Engineering & Construction Sdn Bhd v. Belton Properties Sdn Bhd & Anor* [2001] 2 CLJ 186, 196d per Ramly Ali J.

The provisions of s. 51(2) of the Specific Relief Act 1950 or the corresponding provisions or rules in Australia or United Kingdom, if any, did not appear to have been argued or ventilated in the aforesaid four cases relied upon by the plaintiff for the purpose of obtaining summary judgment in terms of the reliefs sought. The force of the plaintiff's contention on the basis of reliance upon those cases has, in my view, been further diluted.

Section 51(2), *supra*, would in my judgment constitute the ground that "there ought for some reason to be a trial of that claim" (ie, the plaintiff's claim) expressly contained in O. 14 r. 3(1) of the Rules of the High Court 1980.

In the circumstances, I hold that the reliefs sought by the plaintiff are not plain and obvious and summary judgment in terms thereof would be wholly inappropriate. Further, the provisions of s. 51(2), *supra*, clearly militates against the plaintiff's application for the reliefs sought. I therefore dismiss the plaintiff's application.

Costs

In the light of the results of the procedural objection raised by the defendant and the plaintiff's application in encl. (6), wherein both the parties were respectively unsuccessful, and so the scoreboard is seen to be set in equilibrium, I am of the view that a fair and reasonable order in respect of costs is that both parties are to bear the costs of the procedural objection and application respectively, which I hereby order.

Case Management Under O. 34

Pursuant to case management under O. 34 of the Rules of the High Court 1980, I further order that the suit be fixed for hearing on an urgent basis. Parties are directed to file the bundle of pleadings, agreed and non-agreed bundle of documents on or before 11 November 2002. The suit is adjourned to 29 November 2002 and 6 January 2003 for full hearing.